STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JAMES P. THOMAS, JR., by INGRID THOMAS, Personal Representative, Plaintiff-Appellant, v CITY OF FLINT, Defendant-Appellee.	UNPUBLISHED April 20, 2017 No. 331173 Genesee Circuit Court LC No. 12-099337-CZ

Before: SAWYER, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court denying its motion to vacate an award of an arbitration panel entered in favor of defendant. We affirm.

This dispute arises out of a contract between plaintiff's decedent, who operated a business under the name of Bigfoot Towing, and defendant. The contract provided for Bigfoot to tow abandoned and illegally parked cars in the city of Flint. The contract covered a three-year period from 2006 to 2009. The city also paid another towing company, Smitty's Towing, during the time to provide emergency towing, such as at accident scenes. Plaintiff's complaint is that defendant also had Smitty's Towing tow abandoned and illegally parked vehicles instead of dispatching Bigfoot. Plaintiff invoked the arbitration clause of the contract. Ultimately, the arbitration panel, by a 2-1 vote, ruled in favor of defendant.

Plaintiff's first argument on appeal is that the trial court erred in denying plaintiff's motion to set aside the arbitration award based upon the lack of impartiality by the neutral arbitrator[1] or, at minimum, by allowing limited discovery on the issue of the lack of impartiality. We disagree. We review de novo the trial court's decision to uphold the arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

[1] The arbitration panel consisted of three arbitrators. Both plaintiff and defendant selected one arbitrator and those two arbitrators jointly selected the third, neutral arbitrator.

Plaintiff relies on our decision in *Kauffman v Haas*, 113 Mich App 816; 318 NW2d 572 (1982). In *Kauffman*, this Court affirmed the principle that, generally speaking, arbitrators should be free from being deposed regarding the merits of the arbitrator's decision. *Id.* at 819. But the Court allowed for the possibility "that, once an issue of partiality is fairly raised, limited discovery of the arbitrator should be allowed, focusing only on the relationship between the arbitrator and the other party." *Id.* at 819-820. Plaintiff claims that the issue has been "fairly raised." We do not agree.

Plaintiff presents two factual arguments in favor of possibility a lack of impartiality by the neutral arbitrator. First, plaintiff quotes at length from the dissenting arbitrator's opinion. But this is lacking in any suggestion of impartiality by the neutral arbitrator. Not only does the dissent make no claim of any lack of impartiality by the neutral arbitrator, it does not even make a vague allusion to such. Rather, the dissent merely lays out the reasons why it disagrees with the majority's interpretation of the facts and the contract. But the mere fact that one arbitrator disagrees with another does not establish, nor even "fairly raise," the possibility that either lacks impartiality.

Next, plaintiff points to an affidavit by attorney Loyst Fletcher, Jr. This is problematic for a number of reasons. First, the affidavit to which plaintiff refers was clearly provided for this Court in the appeal and, therefore, is not part of the record before us. Second, it merely provides hearsay evidence. And, third, even if we were to consider it, it fails to establish any clear indication of a lack of impartiality. The affidavit claims that, approximately one month after the arbitration panel rendered its decision, attorney Fletcher spoke with the neutral arbitrator at a holiday party, that the topic of the arbitration in this case came up, and the neutral arbitrator indicated "that she was inclined before deliberation to follow the recommendation of" the arbitrator selected by defendant. This hardly establishes any lack of impartiality. It is hardly surprising that the arbitrator might have had initial thoughts on how she might decide the case. Her comments as reported in the affidavit did not reveal that she had made up her mind before the arbitration hearing was held to decide for defendant no matter what was presented at the hearing, nor even that she had made up her mind after the hearing concluded but before deliberations and listening to the arguments. It merely reflects that she had reached a tentative decision after the hearing but before deliberation and, apparently, the deliberations had not swayed her opinion.

Accordingly, we agree with the trial court that plaintiff has failed to present any significant evidence of a lack of impartiality by the neutral arbitrator. Nor, for that matter, was the issue "fairly raised" so as to compel the trial court to allow the arbitrator to be deposed on the matter.

Plaintiff's other issue on appeal is that the trial court should have vacated the arbitration award because the arbitration panel exceeded the scope of their authority and committed an error of law by failing to state what burden of proof it was applying. We disagree. First, plaintiff, while reviewing the various burdens of proof that may apply in a civil case, does not provide any authority for the proposition that an arbitration panel must state in its decision what burden of proof it is applying. But more telling is the heart of plaintiff's argument on this point. Plaintiff again refers to the dissenting arbitrator's opinion and its review of the dissenting arbitrator's conclusions and disagreement with the majority. Plaintiff then states that without "a statement

on its face as to which of the three Burden's [sic] of Proof the majority utilized in evaluating Claimant/Plaintiff's evidence the inescapable conclusion to be drawn is that the majority decided upon its outcome *without any factual basis* thereby exceeding its authority." (Emphasis in original.) We view this as little more than plaintiff's attempt to do that which it acknowledges cannot be done: have the court review the arbitration panel's findings of fact. See *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). In short, in reality plaintiff's argument is not that the arbitration panel committed an error of law, but one of fact. And that is not reviewable by the courts.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Michael J. Riordan